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10 | *Attorneys for Non-Party Spotify USA Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

1 I, Benjamin Kung, declare as follows:

2 1. I am a Director in the Financial Planning & Analysis (“FP&A”) team at
 3 Spotify USA Inc. (“Spotify”), currently serving as our Head of Strategic Planning and Licensing
 4 Finance. I submit this declaration pursuant to Local Civil Rule 79-5(d) in support of Spotify’s
 5 Administrative Motion to Seal Portions of SPOT-EPIC-00001047, submitted concurrently
 6 herewith.

7 2. I have worked at Spotify since March 2016 and have served in various roles
 8 within the FP&A team during that time. My current job responsibilities include overseeing teams
 9 that forecast and manage the economics of our music licensing deals, providing guidance and
 10 visibility to business teams and senior leadership on matters impacting Spotify’s consolidated
 11 margins, and long-range strategic planning for the company. I have personal knowledge of the
 12 facts set forth in this declaration and can testify competently to those facts.

13 3. Spotify is an indirect, wholly-owned subsidiary of Spotify Technology
 14 S.A., a publicly-traded company incorporated in Luxembourg. Founded in Sweden, Spotify
 15 operates the most popular global audio streaming service. Spotify’s streaming service first
 16 launched in Sweden in 2008 and launched in the United States in 2011. Spotify is available in 178
 17 markets, and its platform is used by over 356 million monthly active users.

18 4. The market for audio and music streaming apps and app distribution on
 19 various platforms is highly competitive and includes several of the largest tech companies in the
 20 world, including Apple Inc. (“Apple”). Because Spotify does not directly control a widely-used
 21 channel for distributing its audio streaming app to a large number of users, our business model not
 22 only depends on our ability to acquire content or negotiate licenses with content rights holders on
 23 favorable terms, but also requires us to simultaneously negotiate with distribution partners to keep
 24 distribution fees and commissions as low as possible. To optimize our distribution and user growth
 25 strategies against these variables, Spotify employs significant resources with respect to research
 26 and development, data collection, and analysis about user experience and behavior across various
 27 channels in order to successfully compete in the audio streaming market.

1 5. I understand that Epic Games, Inc. (“Epic”) has notified Spotify that a
 2 document produced by Spotify, bearing Bates numbers SPOT-EPIC-00001047 through
 3 SPOT-EPIC-00001066, was mentioned during a closed session in the trial of this action in
 4 response to questioning by the Court, and that the Court requested a copy of the document.

5 6. I further understand that the document bearing Bates numbers
 6 SPOT-EPIC-00001047 through SPOT-EPIC-00001066 was produced by Spotify in response to
 7 subpoenas served on Spotify by Epic on December 2, 2020, and by Apple on December 8, 2020;
 8 and that Spotify designated this document as “SPOTIFY HIGHLY CONFIDENTIAL – OUTSIDE
 9 COUNSEL EYES ONLY” pursuant to the Supplemental Protective Order Governing Discovery
 10 from Spotify that was filed jointly by Apple and Epic at Spotify’s request and was entered by the
 11 Court in this litigation on February 11, 2021 (“Supplemental Protective Order”) (Dkt. No. 334).

12 7. This document is a report prepared by Compass Lexecon on behalf of
 13 Spotify, which was annexed to a confidential response by Spotify to an Information Request from
 14 the Australia Competition and Consumer Commission (“ACCC”), dated October 21, 2020, in
 15 connection with an investigation into Apple’s App Store practices (the “CL Report”). Spotify
 16 provided this document to the ACCC with the understanding that the ACCC would maintain the
 17 document in confidence and not disclose it to the public, and Spotify branded each page of the
 18 document with the legend “PRIVILEGED AND CONFIDENTIAL.”

19 8. The following chart lists the portions of the CL Report that are sealable for
 20 the reasons stated in this declaration, and the specific portions that are sealable are highlighted in
 21 the unredacted version of the CL Report that is attached as Exhibit A to the Declaration of Shane
 22 M. Palmer, submitted concurrently herewith:

23 Portion of Document Sought to be Sealed	Evidence Offered in Support of Sealing
24 CL Report ¶ 1.4 (highlighted portion)	Declaration of Benjamin Kung ¶¶ 10–11, 17
25 CL Report ¶¶ 1.5–1.6 (highlighted portions)	Declaration of Benjamin Kung ¶¶ 10–12, 17
26 CL Report ¶ 1.7 (highlighted portions)	Declaration of Benjamin Kung ¶¶ 12, 17
27 CL Report ¶ 2.1 (highlighted portion)	Declaration of Benjamin Kung ¶¶ 10–11, 17

1 Portion of Document Sought to be Sealed	Evidence Offered in Support of Sealing
2 CL Report ¶¶ 2.2–2.5 (full paragraphs)	Declaration of Benjamin Kung ¶¶ 10–11, 17
3 CL Report, Figure 1	Declaration of Benjamin Kung ¶¶ 10–11, 17
4 CL Report ¶¶ 2.6–2.12 (full paragraphs)	Declaration of Benjamin Kung ¶¶ 10–12, 17
5 CL Report, Table 1	Declaration of Benjamin Kung ¶¶ 10–12, 17
6 CL Report, Table 2	Declaration of Benjamin Kung ¶¶ 10–12, 17
7 CL Report ¶ 2.13 (full paragraph)	Declaration of Benjamin Kung ¶¶ 10–11, 17
8 CL Report ¶¶ 2.14–2.16 (full paragraphs)	Declaration of Benjamin Kung ¶¶ 10–12, 17
9 CL Report, Table 3	Declaration of Benjamin Kung ¶¶ 10–12, 17
10 CL Report, Figure 2	Declaration of Benjamin Kung ¶¶ 13–17
11 CL Report, Figure 3	Declaration of Benjamin Kung ¶¶ 13–17
12 CL Report, Table 4	Declaration of Benjamin Kung ¶¶ 12, 17
13 CL Report ¶¶ 3.14–3.16 (highlighted portions)	Declaration of Benjamin Kung ¶¶ 12, 17
14 CL Report, Table 5	Declaration of Benjamin Kung ¶¶ 12, 17

17 9. In an effort to narrowly tailor its sealing requests, Spotify does not request
 18 sealing of the CL Report in its entirety. Although certain information reflected in the non-
 19 highlighted portions of the CL Report is non-public, Spotify recognizes the Court's need to balance
 20 Spotify's interests against the public's interest in access to court records and has sought to narrow
 21 its sealing requests as much as possible.

22 10. Certain portions of the CL Report describe the methodology and detailed
 23 findings of proprietary analyses that were undertaken by Spotify to understand the impact of
 24 Apple's marketing restrictions on Spotify's ability to convert users to Spotify's Premium audio
 25 streaming service. Spotify provided this information to the ACCC with the understanding that the
 26 information would be kept confidential and was only willing to produce the CL Report in this
 27 litigation subject to the protections of the Supplemental Protective Order, which restricts access to
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1 the documents containing the data to outside counsel, experts, and trial consultants for the parties
 2 and to the court and its personnel.

3 11. If this information were disclosed publicly, Spotify would be competitively
 4 harmed in its business because it would reveal the sophisticated types of analyses that Spotify
 5 performs to assess user behavior and the effectiveness of Spotify's marketing strategies. If
 6 Spotify's distribution partners knew the types of internal analyses that Spotify is capable of
 7 performing (and has previously performed), they might demand that Spotify undertake such
 8 analyses as a condition of continued partnership. This, in turn, could undermine the value of
 9 Spotify's existing distribution partnerships, undercut Spotify's ability to negotiate favorable
 10 arrangements with new distribution partners, negatively impact deal economics, and generally
 11 harm Spotify's ability to compete and grow its business.

12 12. Further, Spotify would be competitively harmed in its business if the
 13 specific quantitative findings of Spotify's proprietary analyses reflected in the CL Report became
 14 public, because Spotify's audio streaming app competitors could use these findings to assess the
 15 effectiveness of Spotify's advertising for its Premium service on mobile devices and use that to
 16 inform their own business and marketing strategies with respect to product strategy, distribution,
 17 and advertising.

18 13. In addition, Figures 2 and 3 of the CL Report are charts that reflect the
 19 number of monthly active users of Spotify's Premium subscription service on iOS and Android in
 20 Australia, from January 30, 2014 through August 5, 2020. Spotify would be competitively harmed
 21 in its business if these figures were disclosed to the public in the course of the trial in this action.
 22 These figures reflect Spotify's proprietary, internal data and analysis concerning the use of its app
 23 across different platforms and operating systems. This is highly sensitive information that Spotify
 24 keeps confidential and does not disclose to the public. To maintain the confidentiality of the data
 25 reflected in these figures, Spotify invests in data security measures to prevent unauthorized outside
 26 parties from accessing the information, and even restricts access to this data within the company.

27 14. Spotify uses the data reflected in Figures 2 and 3 of the CL Report for a
 28 variety of strategic business purposes, including but not limited to:

- 1 a. developing business strategies to compete with other audio and music
2 streaming app providers, including Apple;
- 3 b. identifying and negotiating with potential distribution partners to broaden
4 the availability of the Spotify app across multiple platforms and expand
5 Spotify's subscription business; and
- 6 c. planning strategic corporate investment decisions to drive sustainable
7 growth and remain competitive in the marketplace.

8 15. If Figures 2 and 3 of the CL Report were disclosed publicly, it would give
9 Spotify's competitors insight into Spotify's internal data and analysis concerning its business
10 operations and relative market share on iOS and Android, including trends in those areas over time.
11 Such information can be used by Spotify's competitors to inform their own business and marketing
12 strategies with respect to product strategy, distribution, and advertising. For example, competing
13 app developers could use the data to understand trends in Spotify usage on iOS and Android and
14 then selectively devote their resources to optimize their apps differently. And the competitive
15 harm to Spotify resulting from any public disclosure of these figures would be amplified because
16 Spotify's competitors generally do not make the same level of platform-specific usage and
17 subscription detail publicly available.

18 16. If Figures 2 and 3 of the CL Report were publicly disclosed, the information
19 would also unfairly disadvantage Spotify in its negotiations with distribution partners (including
20 original equipment manufacturers such as mobile, TV, gaming, and auto partners, as well as app
21 providers and commercial partners), and advertisers. If this material were to fall into the hands of
22 distribution platforms or partners, for example, it would undermine Spotify's position in
23 negotiations, undercut deal terms, negatively impact deal economics, and generally harm Spotify's
24 ability to compete and grow its business.

25 17. Finally, the CL Report was created solely for the purpose of responding to
26 a request from the ACCC on a confidential basis. Although the CL Report was compiled from
27 information that Spotify maintains in the ordinary course of its business, this document is not used
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1 or maintained by Spotify in the format in which it was produced to the ACCC, and it was not
2 prepared with an eye towards providing a complete view of Spotify's business.

3 I declare under penalty of perjury that the foregoing is true and correct. Executed
4 this May 17, 2021 in Brooklyn, New York.

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6 /s/ Benjamin Kung
7 Benjamin Kung
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ATTESTATION

I, Brendan P. Cullen, am the ECF User whose ID and password are being used to file this document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories concur with this filing.

6 | Dated: May 17, 2021

/s/ Brendan P. Cullen
Brendan P. Cullen